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7th Circuit Rules on FMLA Leave With Disability Benefits

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Roadway Express, Inc. ("Roadway") violated the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §2601, et. seq., when it required an employee on FMLA leave to concurrently use her paid sick and vacation leave, ruled the 7th U.S. Circuit Court of Appeals on Feb. 26. Repa v. Roadway Express, Inc, ---F. 2nd---, 7th Cir., No. 06–2360, 2/26/07. The 7th Circuit concluded that a Department of Labor ("DOL") regulation (29 C.F.R. §825.207(d)[1]), which was the subject of conflicting interpretations by the parties, precluded Roadway from requiring the employee to substitute paid leave for unpaid FMLA leave because the employee was receiving disability benefits from a health and welfare benefit plan to which Roadway was required to contribute pursuant to a multiemployer bargaining unit collective bargaining agreement.

Roadway employee Alice Repa suffered a non–work–related injury that required surgery and a six–week absence from work. Repa applied for and was granted disability benefits in the amount of $300 per week for six weeks from the administrator of the Wisconsin multiemployer health and welfare fund. At the same time, Repa requested and was granted FMLA leave by Roadway. Roadway notified her that she was required to substitute any accrued paid leave for any unpaid FMLA leave. Upon return from leave, Roadway paid Repa for five days of sick leave and two weeks of vacation. Repa received this in addition to the $300 per week she had received from the multiemployer fund.

Repa filed suit challenging Roadway's requirement that she use paid sick and vacation leave when she was receiving disability benefits from the multiemployer fund during her FMLA leave. Based on a DOL regulation (29 C.F.R. §825.207(d)[1]), Repa argued that because she was receiving disability benefits from the multiemployer fund, the FMLA provision allowing the substitution of paid leave was inapplicable.

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Roadway disagreed, asserting that the FMLA permitted employers to substitute paid leave for FMLA leave. Roadway argued that the DOL regulation Repa relied on was not applicable to Repa's claim because it precluded paid leave substitution only when an employee was receiving disability benefits for the birth of a child. Roadway also argued that the substitution of employer–paid leave for unpaid FMLA leave was appropriate because the disability benefits Repa received were not from an employer disability plan. Lastly, Roadway argued that to the extent the DOL regulation was read otherwise, it was invalid because it contravened Congress intent in enacting the

FMLA to provide for 12 weeks leave, and the DOL should not be permitted to extend required leave time beyond the 12 weeks provided by the FMLA.

The 7th Circuit held that the district court properly found in favor of Repa.

First, the court acknowledged that the FMLA guarantees qualifying employees 12 weeks of unpaid medical leave each year and that the FMLA allowed employees to elect or employers to require the employee substitute any of the accrued paid vacation leave, personal leave or family leave of the employee for leave provided under the FMLA. 29 U.S.C. §2612(d)(2). However, the court noted that this statutorily approved substitution was limited by the DOL regulations, 29 C.F,R. §825.207(d)(1), which specifically provides:

"Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave." 29 C.F.R. §825.207(d)(1).

The regulation also provides: "As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable." 29 C.F.R. §825.207(d)(2).

The court rejected Roadway's first argument — that the regulation applied only to disability leave for the birth of a child — as only the first sentence of the regulation referenced disability leave for the birth of a child, and the remaining sentences referenced temporary disability plans.

The court rejected Roadway's second argument — that the regulation only applied to benefits paid by an employer's temporary disability plan, not a third–party plan. The court found no language in the regulation making such a limitation.

Roadway had also argued that the regulation was invalid because its effect was to allow the employee to take more than 12 weeks of leave, the amount allowed by the FMLA.

The 7th Circuit, however, refused to address this argument because Roadway had not raised the argument with the trial court. Therefore, while the court's decision that Roadway violated the FMLA was based on the challenged regulation, the 7th Circuit "express[ed] no opinion regarding this regulation's validity and [left] that question for another case."

Employers need to take note of this ruling in administering their FMLA policies. Employers commonly require that an employee substitute all paid leave for FMLA leave to avoid employee entitlement to more than the 12 weeks leave mandated by the FMLA. Under the regulation endorsed by the 7th Circuit, if an employee is receiving disability pay, the employee can extend the 12 week FMLA leave by other paid leave offered by the employer, such as paid vacation, sick and personal days.

Because the 7th Circuit declined to address Roadway's argument that endorsing such a result based on the DOL regulation upset the balance Congress struck when it legislated the 12–week–leave figure, employers in the 7th Circuit will need to comply with this decision unless or until another employer timely and successfully challenges the validity of the regulation at issue.

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